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15 UNITED STATES DISTRICT COURT
16 FOR THE
17 CENTRAL DISTRICT OF CALIFORNIA

18 **HILDA L. SOLIS**,*
19 Secretary of Labor,
20 United States Department of Labor,
21 Plaintiff,

22 v.

23 **BEST MIRACLE CORPORATION**,
24 A California corporation et al.,
25 Defendants.

) Case No. SACV08-00998 CJC (MLGx)

) **PLAINTIFF'S TRIAL BRIEF**

) **The Honorable Cormac J. Carney**

) Final Pretrial Conference:
February 8, 2010

) Trial Date: February 16, 2010

26 * Pursuant to Rule 25(d)(1) of the Federal Rules of
27 Civil Procedure, the caption of this action has been
28 amended to reflect the appointment of Secretary Solis.

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1 **A. Summary of Plaintiff's Claims**

2 Plaintiff Hilda L. Solis, the Secretary of Labor, U.S. Department of Labor ("Sec-
3 retary"), brings this action to enjoin the Defendants, Best Miracle Corporation, a Cali-
4 fornia corporation ("Best Miracle"), Thuy Thi Le individually and as managing agent of
5 the corporate Defendant and Toan Van Nguyen, individually and as managing agent of
6 the corporate Defendant (collectively, "Defendants"), from violating the provisions of
7 Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 ("FLSA" or
8 "Act"), 29 U.S.C. § 215(a)(2) and § 215(a)(5) and continuing to withhold payment of
9 unpaid minimum wages and overtime due the Defendants' employees under the FLSA
10 plus pre-judgment interest.

11 The Secretary shall establish that during the period of July 30, 2005 through Au-
12 gust 12, 2007 ("subject period"), Defendants violated the FLSA's minimum wage (29
13 U.S.C. § 206), overtime (29 U.S.C. § 207) and recordkeeping provisions (29 U.S.C.
14 § 211). Because the Defendants shipped goods made by employees who were not paid
15 the wages required by the Act, they violated the FLSA's prohibition on shipment of "hot
16 goods," 29 U.S.C. § 215. This action is brought under FLSA Section 17, 29 U.S.C.
17 § 217, which provides for injunctive relief in actions brought by the Secretary.

18 **B. Plaintiff's Contentions**

19 **I. Employees of Best Miracle are covered by the Fair Labor Standards Act**

20 To establish that the Defendants are subject to the requirements of the FLSA,
21 Plaintiff will show that the Defendants employed employees in an enterprise engaged in
22 commerce or in the production of goods for commerce as defined in 29 U.S.C.
23 § 203(s)(1). An enterprise engaged in commerce or in the production of goods for com-
24 merce means an enterprise that (i) has employees engaged in commerce or in the produc-
25 tion of goods for commerce, or that has employees handling, selling or otherwise work-
26 ing on goods or materials that have been moved in or produced for commerce by any
27 person; and (ii) is an enterprise whose annual gross volume of sales made or business
28 done is not less than \$500,000. FLSA Section 3(s)(1)(A), 29 U.S.C. § 203(s)(1)(A).

1 Once enterprise coverage is established, all employees of the enterprise are covered by
2 the FLSA's protections. Maryland v. Wirtz, 392 U.S. 183, 188, 88 S. Ct. 2017 (1968).

3 Evidence: Defendants have indicated that they shall stipulate to enterprise cover-
4 age.

5 **II. Defendants Violated the FLSA's Recordkeeping Requirements**

6 The Plaintiff contends that during the subject period the Defendants violated Sec-
7 tions 11(c) and 15(a)(5) of FLSA, 29 U.S.C. § 211(c) and § 215(a)(5), because they
8 failed to maintain accurate records of employee data, earnings, and hours worked. Sec-
9 tion 11(c) of the FLSA, 29 U.S.C. § 211(c), mandates the making, keeping and preserv-
10 ing of information relating to employees' wages and hours and other conditions of em-
11 ployment, and authorizes the Secretary of Labor to issue regulations specifying the re-
12 cords to be kept. The regulations are contained in 29 C.F.R. § 516.

13 Evidence: Plaintiff will establish the recordkeeping violations by (i) the testimony
14 of the Defendants' employees as to their hours worked and the failure of the time cards
15 to accurately reflect all hours worked; (ii) the testimony of John Leung, the investigator
16 for the Wage and Hour Division, Employment Standards Administration, U.S. Depart-
17 ment of Labor ("Wage and Hour Investigator," or "WHI"), that Defendants failed to pro-
18 duce the time records for all the hours worked by employees; (iii) testimony and docu-
19 mentary evidence regarding surveillance of the Best Miracle shop conducted by WHI
20 Leung. Mr. Leung observed at least 30 instances where cars registered to employees
21 were parked at the shop on days where the time cards did not show the employee as hav-
22 ing worked there, or long before or after the employee was shown as having punched in
23 or out for the day; (iv) testimony and documentary evidence that Defendants' payroll re-
24 cords falsely show that employees as working between 30-40 hours per week when, in
25 fact, they worked approximately 60 hours a week; (v) testimony and documentary evi-
26 dence from Wage Hour investigators regarding a July 30, 2007 visit to the shop, when
27 the WH investigators observed 31 employees at their work stations, 6 in the lunch room
28 and 10 outside the shop, while Defendants' timecards were punched in to show only 15

1 as working on that day; (vi) discrepancies between Defendants' payroll records and time
2 cards including instances where employees' time cards showed they had worked but
3 they do not appear on the payroll; (vii) employee testimony regarding instances where
4 they were paid in cash; (viii) testimony and documentary evidence that the cash pay-
5 ments were not reflected on the payroll records; and, (ix) the admission by Defendants
6 that the Best Miracle shop was open from 6:00 a.m. to 6:00 p.m. Monday through Friday
7 and from 6:00 a.m. to 12:00 p.m. or later, up through 5:00 p.m., on Saturdays.

8 Applicable Law: An employer fails to keep the required records at his peril.
9 Where the employer fails to keep accurate and complete payroll and hours records, the
10 Plaintiff may invoke the criteria set forth in Mt. Clemens Pottery Co., 328 U.S. 680, 66
11 S. Ct. 1187 (1946), requiring the employer to produce evidence of the precise amount of
12 work performed or evidence to rebut the reasonableness of the inferred extent of viola-
13 tions. Id. at 687-688. This rule has been applied in many circuit courts in actions
14 brought by the Secretary of Labor. See, e.g., Brock v. Seto, 790 F.2d 1446, 1448-49 (9th
15 Cir. 1986); Mumbower v. Callicott, 526 F.2d 1183, 1186 (8th Cir. 1975); Brennan v.
16 General Motors Acceptance Corp., 482 F.2d 825, 829 (5th Cir. 1973); Hodgson v.
17 Humphries, 454 F.2d 1279, 1283 (10th Cir. 1972).

18 The testimony of the employees as to their hours worked, discrepancies in time
19 records, manner of payment and observations of Wage Hour investigators will establish
20 that Defendants' time and payroll records are not accurate or complete in that they con-
21 sistently reflect fewer hours than employees actually worked.

22 **III. Defendants Failed to Pay the Minimum Wage Required by the FLSA**

23 The Plaintiff contends that the Defendants violated the provisions of Sections 6
24 and 15(a)(2) of the FLSA, 29 U.S.C. § 206 and §215(a)(2), by paying their employees
25 wages at rates less than the appropriate minimum wage during the subject period.
26 Section 6(a) of FLSA, 29 U.S.C. § 206(a), provides:

27 Every employer shall pay to each of his employees who in any workweek is
28 engaged in commerce or in the production of goods for commerce or is em-

1 ployed in an enterprise engaged in commerce or in the production of goods
2 for commerce, wages...[of] \$5.15 [\$5.85] per hour....¹

3 Evidence: The Plaintiff will establish that employees were not paid the minimum
4 wage required by the FLSA by the evidence adduced in support of the recordkeeping
5 violation as set forth above, and, in addition, (i) the claim/admission by Defendants that
6 they did not make any cash payments to employees; (ii) the testimony of the Wage Hour
7 Investigator as to the absence of any cash pay records produced by Defendants, (iii) the
8 testimony of employees that they worked approximately 60 hours per week and ob-
9 served that other employees worked similar hours; and, (iv) testimony and documentary
10 evidence regarding Wage Hour's calculations of the unpaid minimum wage due.

11 Applicable Law: To prove Defendants violated this provision of the FLSA, the
12 Plaintiff must show that the Defendants employed persons and compensated them at
13 rates less than those required by the FLSA for each hour worked. Mt. Clemens Pottery
14 Co., 328 U.S. at 687; Brock v. Seto, 790 F.2d at 1448-49. However, in view of the re-
15 medial purpose of the FLSA and the employer's statutory obligation to keep accurate
16 and complete payroll and hours records, the employee's burden is not to be an impossi-
17 ble hurdle. Id. As the Supreme Court held in Mt. Clemens Pottery Co., 328 U.S. at 687:

18 Where the employer's records are inaccurate or inadequate and the employee
19 cannot offer convincing substitutes ... the solution ... is not to penalize the
20 employee by denying him any recovery on the ground that he is unable to
21 prove the precise extent of uncompensated work. Such a result would place a
22 premium on an employer's failure to keep proper records ...; it would allow
23 the employer to keep the benefits of an employee's labor without paying due
24

25 ¹ During the subject period, the minimum wage rate was \$5.15 per hour for work per-
26 formed prior to July 24, 2007, and \$5.85 per hour for work performed on July 24, 2007
27 and after.
28

1 compensation...In such a situation, we hold that an employee has carried out
2 his burden if he proves that he has, in fact, performed work for which he was
3 improperly compensated and if he produces sufficient evidence to show the
4 amount and extent of that work as a matter of just and reasonable inference.

5 The testimony of the employees will show a consistent pattern of hours worked
6 and pay received. Under Mt. Clemens, this proof is sufficient to show the amount and
7 extent of that work as a matter of just and reasonable inference and establishes that the
8 employees performed work for which they were improperly compensated. To require
9 otherwise would enforce the type of penalty that Mt. Clemens holds is impermissible:
10 rewarding the employer's failure to keep proper records and allowing the employer to
11 keep the benefits of an employee's labor without paying due compensation. Wirtz v.
12 Dix Box Co., 322 F.2d 499, 501-02 (9th Cir. 1963).

13 Although the Defendants can seek to defend against the employees' claims by es-
14 tablishing the precise number of hours worked or by presenting evidence sufficient to
15 negate the reasonableness of the inference to be drawn from the employees' evidence,
16 they will not be able to do so. The witnesses' testimony will clearly establish that any
17 after-the-fact, self-serving testimony by Defendants that their employees could not have
18 worked the hours alleged is completely insufficient to negate the Plaintiff's evidence.
19 Consequently, under the rationale of Mt. Clemens, the Plaintiff's claims for minimum
20 wage underpayment should be sustained.

21 **IV. Defendants Failed to Pay Employees an Overtime Rate for All Hours**
22 **Worked over 40 Hours in a Workweek**

23 The Plaintiff contends that the Defendants violated the provisions of Sections 7
24 and 15(a)(2) of the FLSA, 29 U.S.C. § 207 and § 215(a)(2), by employing employees for
25 work weeks longer than forty (40) hours without compensating those employees for their
26 employment in excess of forty (40) hours at rates not less than one and one-half times
27 the regular rates at which they were employed. Section 7(a) of FLSA, 29 U.S.C.
28 § 207(a), provides:

1 [N]o employer shall employ any of his employees who in any workweek is
2 engaged in commerce or in the production of goods for commerce, or is em-
3 ployed an enterprise engaged in commerce or in the production of goods for
4 commerce for a workweek longer than forty hours unless such employee re-
5 ceives compensation for his employment in excess of the hours above speci-
6 fied at a rate of not less than one and one-half times the regular rate at which
7 he is employed.

8 Evidence: This contention will be supported by the evidence adduced in support
9 of the recordkeeping violation as set forth above, and, in addition, (i) employee testi-
10 mony that they worked approximately 60 hours per week, from 6:00 am to 6:00 pm,
11 Monday through Friday, and then from 6:00 am to 12:00 pm or later on Saturdays, and
12 some Sundays; (ii) employee testimony and the admission of Defendants that some em-
13 ployees were paid on a piece rate basis, while others were paid an hourly rate; (iii) testi-
14 mony of employees that they were paid piece rate for all hours worked, including hours
15 worked in excess of 40 hours in a workweek; (iv) testimony of employees that they were
16 paid a straight hourly rate for all hours worked, including hours worked in excess of 40
17 hours in a workweek; (v) testimony and documentary evidence regarding Wage Hour's
18 calculations of the unpaid overtime compensation due; (vi) the claim/admission by De-
19 fendants that they did not make any cash payments to employees; (vii) the testimony of
20 the Wage Hour Investigator as to the absence of any cash pay records produced by De-
21 fendants, and, (viii) testimony and documentary evidence of surveillance performed by
22 the Wage Hour investigator that supports a work pattern of from 6:00 am to 6:00 pm
23 Monday through Friday, and from 6:00 am to 12:00 pm or later on Saturdays.

24 Applicable Law: Under this provision, the Plaintiff's burden is simply to show
25 that the Defendants' employees worked hours in excess of the forty hour standard in a
26 particular workweek and were not compensated for their work hours above forty at a rate
27 of pay of not less than one and one-half times their regular rates of pay. United States v.
28 Rosenwasser, 323 U.S. 360, 363, 65 S.Ct. 295, 296-97 (1945). Using the testimony of

1 the Defendants' employees and Wage Hour Investigators, the Plaintiff will prove that
2 the Defendants failed to comply with the requirements of Section 7 of the FLSA, 29
3 U.S.C. §207.

4 As discussed above, because of the Defendants' failure to keep accurate records of
5 the hours worked by and the pay given to the Best Miracle employees during the subject
6 period, the rule in Mt. Clemens Pottery Co., 328 U.S. at 687-688 is controlling here as
7 well.

8 **V. Necessary Proof of Backwages Due**

9 The Plaintiff contends that Defendants' underpayments of minimum wage for the
10 period of 8/29/05 through 9/4/05 (pay date 9/9/05) through pay period 8/6/07 – 8/12/07
11 (pay date 8/17/07) is \$ 3,405.00 (if employee testimony regarding cash pay is credited to
12 the benefit of the Defendants) or \$124,083.00 if cash pay is not credited. Unpaid over-
13 time for the same period is \$ \$172,832.50 with cash pay credited, or \$ 391,633.50 if it is
14 not.

15 Evidence: The Plaintiff has calculated the backwages due based on the antici-
16 pated evidence that will establish the recordkeeping, minimum wage and overtime viola-
17 tions as set forth above. Plaintiff will rely on testimony and documentary evidence of
18 Wage Hour personnel to explain the calculations.

19 Applicable Law: To establish the amount of underpayments, as discussed infra,
20 where there are no accurate records of actual hours worked, as is the case here, an em-
21 ployee has carried his burden if he proves that he has in fact performed work for which
22 he was improperly compensated and if he produces sufficient evidence to show the
23 amount and extent of that work as a matter of just and reasonable inference. The burden
24 then shifts to the employer to come forward with evidence of the precise amount of work
25 performed or with evidence to negate the reasonableness of the inference to be drawn
26 from the employee's evidence. If the employer fails to produce such evidence, the court
27 may then award damages to the employee, even though the result is only approximate.
28 Mt. Clemens Pottery Co., 328 U.S. at 687-688.

1 It is well established that “[e]ach employee need not testify in order to make out a
2 prima facie case of the number of hours worked as a matter of ‘just and reasonable infer-
3 ence.’” Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 472 (11th Cir. 1982). “The
4 *Mt. Clemens Pottery* standard allows district courts to award back wages under the
5 FLSA to non-testifying employees based upon the fairly representative testimony of
6 other employees.” McLaughlin v. Ho Fat Seto, 850 F.2d 586, 589 (9th Cir. 1988).
7 Based on the representative testimony, the court may conclude that a prima facie case
8 has been made for non-testifying employees as well. General Motors Acceptance Corp.,
9 482 F.2d at 829. “There is no requirement that to establish a *Mt. Clemens* pattern or
10 practice testimony must refer to all nontestifying employees...The requirement is only
11 that the testimony be fairly representative.” Donovan v. Bel-Loc Diner, Inc., 780 F.2d
12 1113, 1116 (4th Cir. 1985)

13 Even if the representative testimony is “inconsistent in terms of exact days and
14 hours of overtime worked,” a court may find,” as a matter of just and reasonable infer-
15 ence,” that all employees regularly worked excess time. Ho Fat Seto, 850 F.2d at 589.
16 An employer may fail to meet his burden to negate the reasonable inferences drawn from
17 representative employees’ testimony if the fact finder determines the employer’s wit-
18 nesses not to be credible. Id. at 590.

19 No fixed ratio exists for determining what percentage of employees must testify in
20 order to satisfy the plaintiff’s burden. However, in other cases involving fairly small
21 employee populations, a limited number of employee positions, and uniform work tasks,
22 Courts have found a small number of employees representative of the whole. In Ho Fat
23 Seto, which was also a garment sewing shop, the Court found that five testifying em-
24 ployees established a prima facie case on behalf of themselves and twenty-three non-
25 testifying employees. Id., at 589. Only seven out of 200 employees testified in the Mt.
26 Clemens Pottery case. Other cases are in accord: McLaughlin v. Dialamerica Market-
27 ing, 716 F.Supp. 812, 824 (D.N.J. 1989) (43 out of 393 market telephone researchers
28 was sufficiently representative testimony for all employees); Bel-Loc Diner, 780 F.2d at

1 1116 (22 employees who testified were found to be representative of 98 kitchen staff and
2 servers in an all-night diner).

3 In accordance with the above, the Plaintiff submits that her burden is to produce
4 evidence by which the Court can by "just and reasonable inference" find the hours
5 worked by the Defendants' employees and the pay given to the Defendants' employees.
6 The burden then shifts to the Defendants to come forward with precise evidence to ne-
7 gate the reasonableness of the inferences to be drawn from the evidence presented by the
8 Plaintiff. The Defendants' failure to carry their burden results in a finding for the Plain-
9 tiff. Skipper v. Superior Dairies, Inc., 512 F.2d 409, 419 (5th Cir. 1975); Wirtz v. Lieb,
10 366 F.2d 412 (10th Cir. 1966).

11 The statutory minimum wage and overtime requirements cannot be disregarded
12 merely because there are employees who are willing to work, or have worked, for lower
13 rates without additional overtime pay. Aside from thwarting the express legislative pur-
14 pose of maintaining "the minimum standard of living necessary for health, efficiency,
15 and general well-being of workers", section 2(a) of FLSA, 29 U.S.C. §202(a), such non-
16 compliance gives an employer an unwarranted competitive advantage over those who
17 conform to the Act. See e.g., Citicorp Industrial Credit Inc. v. Brock, 483 U.S. 27, 107
18 S.Ct. 2694 (1987); Schultz v. Mistletoe Express Service, Inc., 434 F.2d 1267 (10th Cir.
19 1970); Wirtz v. Malthor, Inc., 391 F.2d 1 (9th Cir. 1968); Brennan v. Davis, 76 CCH LC
20 ¶33,245 (N.D. Ga. 1975).

21 **VI. Backwage Computations**

22 Because the employer failed to maintain an accurate record of hours worked and
23 wages paid, Wage Hour reconstructed the hours worked as 60 hours per week worked by
24 each employee and reconstructed the payroll to include a credit of \$200 per week for
25 wages paid in cash to each employee that do not appear in the payroll records. To calcu-
26 late unpaid minimum wage, Wage Hour divided each employee's earnings by the num-
27 ber of hours worked, to obtain the hourly rate. Where that rate fell below the applicable
28 minimum wage, Wage Hour calculated the underpayment.

Overtime must be paid at a rate of time and one half an employee's regular rate for all hours worked in excess of 40 hours in a workweek. In calculating backwages, the regular rate must be at least equal to the state's minimum hourly rate which was \$6.75 through December 31, 2006, and \$7.50 starting on January 1, 2007. Therefore, for those employees whose regular rate was below \$6.75 (or \$7.50) per hour, Wage Hour calculated the difference between \$6.75 (or \$7.50) and the regular rate and multiplied that amount by 60, i.e., the total number of hours worked in each workweek, to obtain the regular rate due. To obtain the unpaid half time, Wage Hour multiplied the number of hours worked over 40 by one half of \$6.75 (or \$7.50). Wage Hour accounted for variations in schedules and slow seasons by reducing the number of workweeks for which overtime was due.

Evidence: The Plaintiff has calculated the backwages due based on the anticipated evidence that will establish the recordkeeping, minimum wage and overtime violations as set forth above. Plaintiff will rely on testimony and documentary evidence of Wage Hour personnel to explain the computations.

Applicable Law: When calculating unpaid overtime, the regular rate must be at least equal to the state's minimum wage rate pursuant to 29 C.F.R. § 778.5. Testimony and document evidence of Wage Hour personnel are offered as an aid to the Court in computing the underpayments. Seto, 790 F.2d at 1449; Humphries, 454 F.2d at 1282.

VII. Defendants violated the "hot goods" provision of the FLSA

Under Section 15(a)(1) of the FLSA, it is unlawful for any person to transport, offer for transportation, ship, deliver or sell in commerce, or ship, deliver or sell with knowledge that shipment, delivery or sale in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or 7 of the FLSA, 29 U.S.C. § 215(a)(1).

The Plaintiff contends that Defendants violated this "hot goods" provision when they shipped goods to Moa Moa, a garment manufacturer with whom they contracted to sew garments and other manufacturers including Byer of California throughout the sub-

1 ject period. As these goods were produced by Best Miracle employees who were not
2 paid the minimum wage and overtime required under the Act, the goods were hot, and a
3 violation of the prohibition of the shipment of hot goods occurred.

4 Evidence: This contention will be supported by the evidence adduced of the re-
5 cordkeeping, minimum wage and overtime violations set forth above, as well as (i) tes-
6 timony of Wage Hour Investigator Leung and Defendants establishing that Best Miracle
7 employees worked on goods for garment manufacturers Moa Moa and Byer of Califor-
8 nia throughout the subject period; (ii) testimony of Moa Moa's general manager Young
9 Chung, that Moa Moa shipped goods produced by Best Miracles to various locations
10 outside of the state of California throughout the subject period; (iii) testimony establish-
11 ing that in the weeks prior to July 30, 2007, Best Miracle employees worked on goods
12 for Byer of California and Moa Moa; (iv) testimony and documentary evidence estab-
13 lishing that manufacturers Moa Moa and Byer of California were notified by the De-
14 partment of Labor that the goods produced by the employees of Best Miracle were "hot
15 goods," and shipment of those goods would violate the FLSA; (v) testimony that Moa
16 Moa shipped "hot goods" after July 30, 2007 after Defendant Thuy Thi Le advised them
17 to do so; and, (vi) the documentary evidence regarding the specific goods shipped in in-
18 terstate commerce.

19 Applicable Law: The Supreme Court has pointed out that "exclusion from inter-
20 state commerce of goods produced under substandard conditions is not simply a means
21 to enforce other statutory goals; it is itself a central purpose of the FLSA." Citicorp In-
22 dustrial Credit, 483 U.S. at 36, n8. (Holding that a third party who held a security inter-
23 est in goods produced by a manufacturer who violated the FLSA was subject to an in-
24 junction under the FLSA hot goods provision). The broad nature of Section 15(a)(1) is
25 necessary to promote a critical purpose of the FLSA, i.e., to maintain a level playing
26 field for employers by preventing the introduction of substandard goods into the stream
27 of commerce so that non-complying employers do not gain an advantage over those who
28 comply with the FLSA. Id., at 36-37. See also Herman v. Fashion Headquarters, Inc.,

1 992 F.Supp. 677, 679 (S.D.N.Y. 1998) (“Because hot goods are produced more cheaply,
2 they provide a competitive advantage to those who violate the FLSA and a comparative
3 disadvantage to law-abiding manufacturers and distributors.”) The purpose of such an
4 injunction is to “keep tainted goods from entering the channels of interstate commerce in
5 competition with goods produced under the Act’s standards.” Brock v. Kentucky Ridge
6 Mining Co., Inc., 635 F.Supp. 444, 451 (W.D. Ky. 1985)

7 **VIII. Defendants Thuy Thi Le and Toan Van Nguyen are employers**

8 The Plaintiff contends that Defendants Thuy Thi Le and Toan Van Nguyen are
9 employers of the employees who worked at the Best Miracle Corporation within the
10 meaning of the FLSA section 3(d), 29 U.S.C. 203(d). They had the authority to hire and
11 fire employees, set wages, hours and working conditions and other conditions of em-
12 ployment and/or knowledge that employees were performing work for which they were
13 not paid in conformance with the FLSA. They also made business decisions that di-
14 rectly impacted employees’ wages when they entered into contracts with garment manu-
15 facturers at rates where compliance with the FLSA was unlikely.

16 Evidence: This contention will be supported by (i) the stipulation of Defendant
17 Le that she was an employer within the meaning of the FLSA; (ii) the testimony of em-
18 ployees who worked at Best Miracle Corporation, regarding Defendant Le’s and
19 Nguyen’s role in operating the shop and preparing and distributing payroll.

20 Applicable Law: As defined by the Act, an employer includes those who manage
21 the business regarding employment practices. Bonnette v. California Health and Wel-
22 fare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983); Donovan v. Sabine Irrigation Co., 695
23 F.2d 190, 194-195 (5th Cir.); Donovan v. Janitorial Services, Inc., 672 F.2d 528, 530-
24 531 (5th Cir. 1982). Corporate officials may be held individually responsible for viola-
25 tions of the Act and may be personally restrained from withholding unpaid wages due to
26 affected employees. See Brock v. Hamad, 867 F.2d 804 (4th Cir. 1989); Sabine Irriga-
27 tion Co., 695 F.2d at 196.

1 In determining whether a corporate official or owner is an employer within the
2 meaning of the Act, the court must focus upon the “totality of circumstances” and “the
3 economic realities” of the worker’s employment. Bureerong v. Uvawas, 922 F. Supp.
4 1450, 1467 (C.D. Cal. 1996) (citations omitted); see also Donovan v. Grim Hotel Co.,
5 747 F.2d 966, 972 (5th Cir. 1984), cert. denied, 471 U.S. 1124 (1985); Sabine Irrigation
6 Co., 695 F.2d at 194. By setting the hours and wages, hiring and firing, and otherwise
7 acting in the interest of the employer, an individual may be held liable as an employer.
8 See Brennan v. Jeffries, 398 F. Supp. 471, 472-73 (D. Ariz. 1973), aff’d, 1975 WL 3574
9 (9th Cir. 1975) (personal liability imposed on owner). “Where an individual exercises
10 ‘control over the nature and structure of the employment relationship,’ or ‘economic
11 control’ over the relationship, that individual is an employer within the meaning of the
12 Act.” Lambert v. Ackerly, 180 F.3d 997, 1012 (9th Cir. 1999)(citations omitted).

13 As employers, they are jointly and severally liable with the corporate defendant
14 for backwages that may be found to be due to the employees of the Best Miracle Corpo-
15 ration. Donovan v. Hamm’s Drive Inn, 661 F.2d 316 (5th Cir. 1981); Marshall v. Ger-
16 will, Inc., 495 F.Supp. 744 (D. Md. 1980).

17 **IX. Prospective Injunction**

18 The Plaintiff seeks to enjoin the Defendants, pursuant to section 17 of the FLSA,
19 29 U.S.C. § 217, from further violation of the FLSA’s recordkeeping, minimum wage,
20 and overtime provisions. As discussed below, section 17 of the FLSA, 29 U.S.C. § 217,
21 also includes provisions for the recovery of unpaid minimum wage and overtime com-
22 pensation withheld from employees.

23 In this case, the prospective injunction sought by the Plaintiff will not subject the
24 Defendants to any penalty or hardship. It does nothing more than require the Defendants
25 to do what the FLSA requires: compliance with the law for the public benefit. See Brock
26 v. Big Bear Market No. 3, 825 F.2d 1381, 1383 (9th Cir. 1987); Marshall v. Chala En-
27 ters., 645 F.2d 799, 804 (9th Cir. 1981). The injunction merely shifts the responsibility
28 for compliance onto the Defendants' shoulders instead of upon the government. Dono-

1 van v. Sureway Cleaners, 656 F.2d 1368, 1375 (9th Cir. 1981). The purpose of an in-
2 junction under the FLSA is not to punish past violations, but only to stop existing viola-
3 tions or to prevent future infractions in the public interest. It is the number, nature and
4 extent of violations under the FLSA which is the determinative factor of the necessity to
5 protect the public interest by judicial decree. The Plaintiff expects to prove by credible
6 evidence each of the violations discussed above and contends that an injunction restrain-
7 ing the Defendants from future violations of the minimum wage, overtime and record-
8 keeping provisions of the FLSA should issue in this case.

9 In addition, Plaintiff contends that the Defendants should be enjoined from the
10 continued withholding of minimum wages and overtime pay, plus pre-judgment interest.
11 This contention will be supported by the testimony and documentary evidence used to
12 establish the Defendants' violations of sections 6, 7, and 11(c) of FLSA, 29 U.S.C.
13 §§ 206, 207, 211(c). Plaintiff further requests that the injunction include a provision re-
14 quiring Defendant Le to report her employment or business location to the Department
15 of Labor every six months.

16 **X. Prejudgment Interest**

17 Plaintiff contends that prejudgment interest should be assessed on the backwages
18 found due. Prejudgment interest is necessary to make whole Best Miracle's employees
19 for the losses they have suffered caused by the delay and unlawful withholding of their
20 wages. Ford v. Alfaro, 785 F.2d 835, 842-843 (9th Cir. 1986). It also serves to remedy
21 the competitive disadvantage faced by employers that comply with the FLSA. Donovan
22 v. Sovereign Security, 726 F.2d 55, 58 (2nd Cir. 1984) The rate used by the Internal
23 Revenue Service to calculate underpayments owed to the United States pursuant to 26
24 U.S.C. § 6601 is appropriate.

25 **XI. Statute of Limitations**

26 Plaintiff contends that this action is subject to a three year statute of limitations
27 because Defendants' violations of the FLSA were willful. The Secretary intends to
28 prove that the violations were willful based on Defendants' deliberate falsification of re-

1 cords, and a prior Wage Hour investigation of a garment shop run by Defendant Le that
2 established similar wage and recordkeeping violations.

3 A three year statute of limitations is imposed on employers who “willfully” vio-
4 late the FLSA pursuant to Section 6(a) of the Portal to Portal Act, 29 U.S.C. § 255 (a).
5 For the purposes of the statute of limitations, a violation is "willful" if the employer
6 knew or showed reckless disregard as to whether its conduct violated the Act.
7 McLaughlin v. Richland Shoe, 486 U.S. 128 (1988). Reckless disregard may be shown
8 by repeated violations, the falsification or withholding of required records, or other at-
9 tempts to evade the Act’s requirements. See, e.g., Martin v. Deiriggi, 985 F.2d 129, 136
10 (4th Cir. 1992) (Court affirmed willfulness finding based on abundant evidence of know-
11 ing violation, including evidence that employer withheld records to impede DOL); Dole
12 v. Elliot Travel & Tours, 942 F.2d 962, 967 (6th Cir. 1991) (Willful violation affirmed
13 where employer had actual knowledge of Act’s requirements from earlier DOL investi-
14 gation, and previously agreed to pay overtime and comply with Act, but failed to).

15 Evidence: The Secretary shall offer the following evidence in support of her con-
16 tention that the violations of the FLSA committed by Defendants were willful: (i) the
17 testimony of Best Miracle employees establishing that Defendants’ time and payroll re-
18 cords were falsified; (ii) discrepancies between Defendants’ payroll records and time
19 cards including instances where employees’ time cards showed they had worked but
20 they do not appear on the payroll; (iii) testimony and documentary evidence of Wage
21 Hour investigators regarding discrepancies between their observations of employee work
22 and the time and payroll records supplied by Defendants; (iv) the admission by Defen-
23 dants that they were aware of the requirements of the FLSA; (vi) testimony and docu-
24 mentary evidence that Defendant Thuy Thi Le was previously investigated by Wage
25 Hour when she operated a garment shop called Double T Corporation; (vii) Wage
26 Hour’s conclusion that employees of Double T Corporation were not paid the minimum
27 wage and overtime required by the FLSA and that accurate time and payroll records
28 were not maintained; and, (viii) Defendant Thuy Thi Le was notified of the findings of

1 the Wage Hour investigation of Double T Corporation and the requirements of the
2 FLSA, particularly with application to a garment shop and agreed to comply with the
3 FLSA in the future.

4 **C. Defendant's Affirmative Defenses**

5 Defendants have indicated that they intend to pursue the following affirmative de-
6 fenses pled in their First Amended Answer²:

7 First Affirmative Defense: Defendants allege that each and every cause of action
8 pled in the complaint fails to state a cause of action

9 Plaintiff's position: The Secretary is unable to determine the elements of this de-
10 fense as it is not an affirmative defense at all. Defendants have denied the charging alle-
11 gations in the Secretary's Complaint. Affirmative defenses "admit allegations in the
12 complaint but assert facts that would defeat recovery." Gaudiello v. Allied-Signal, Inc.,
13 1990 WL 304271 at * 1 (N.D.Ill. 1990) citing Fleming v. Kane County, 636 F. Supp.
14 742, 749 (N.D.Ill. 1986)

15 In any case, the Secretary is authorized to seek injunctive relief under Section 17
16 of the FLSA, 29 U.S.C. § 217, to enforce the FLSA, and recover unpaid wages as set
17 forth in the Complaint.

18 Second Affirmative Defense: Defendants allege that the Complaint fails to state
19 facts sufficient to entitle Plaintiff to an award of any damages, costs, attorneys' fees or
20 any other type of relief.

21 Plaintiff's position: The Secretary is unable to determine the elements of this de-
22 fense as it is not an affirmative defense at all. Defendants have denied the charging alle-
23 gations in the Secretary's Complaint. An affirmative defense admits allegations in the
24 complaint but asserts facts that would defeat recovery. In any case, the Secretary is au-
25 thorized to seek injunctive relief under Section 17 of the FLSA, 29 U.S.C. § 217, to en-
26

27 ² Defendants indicated that they are no longer pursuing their Seventh Affirmative
28 Defense as to Defendant Thuy Thi Le or their Affirmative Defenses Eight, Nine, Ten

1 force the FLSA, as set forth in the Complaint and recover unpaid wages.

2 Third Affirmative Defense: Defendants allege that Plaintiff's claims are barred
3 under the applicable statute of limitations

4 Secretary's position: Under the Portal to Portal Act, an action to enforce the
5 FLSA and recover unpaid wages must be commenced within two years from the date the
6 cause of action accrued, except that the limitations period is extended to three years for a
7 willful violation. 29 U.S.C. § 255(a). A violation is willful if the defendant either knew
8 her conduct violated the FLSA or showed reckless disregard for whether her actions
9 complied with the Act. Richland Shoe, 486 US at 133.

10 The Secretary will defeat any claims that the violations were not willful with evi-
11 dence of the following: (i) Defendants Thuy Thi Le and Toan Van Nguyen have admit-
12 ted that they were aware of the requirements of the FLSA; (ii) Documentary evidence
13 and testimony by Wage Hour Investigator Leung and others will establish that Defen-
14 dant Thuy Thi Le operated a garment shop which was registered under her sister's name
15 called Double T Corporation ("Double T"). Double T was the subject of an investiga-
16 tion by Wage Hour which determined that under the helm of Defendant Thuy Thi Le,
17 Double T had violated the FLSA's minimum wage, overtime and recordkeeping re-
18 quirements. Double T paid the backwages calculated by Wage Hour, and Defendant
19 Thuy Thi Le agreed to comply with the FLSA in the future; (iii) Documentary evidence
20 and testimony of Best Miracle employees will establish that Defendants falsified Best
21 Miracle records to make it appear that employees worked fewer hours than they had ac-
22 tually worked.

23 Fourth Affirmative Defense: Defendants allege that Plaintiff failed to mitigate its
24 damages.

25 Plaintiff's position: Defendants apparently intend to establish this defense with
26 evidence that Byer of California, a garment manufacturer with whom Best Miracle con-

27
28 and Twelve.

1 tracted, posted \$9,392.60 with the Department of Labor to cover a portion of the back-
2 wages owed by Best Miracle to its employees. Defendants contend that these funds
3 should be credited against any amounts found due by the Court in this matter. Plaintiff
4 does not disagree that money posted by Byer of California can be used to set off Best
5 Miracle's liability for the amount posted.

6 Defendants also apparently claim that Plaintiff may intend to recover additional
7 amounts owed from another garment manufacturer, Moa Moa, and, thus, Plaintiff will
8 obtain a double recovery of the backwages. There is no basis for this argument because
9 except for the instant action, Plaintiff has not instituted suit against Moa Moa or any
10 other entity to recover the backwages owed to the employees of Best Miracle.

11 Seventh Affirmative Defense: Defendants allege that Defendant Nguyen is not an
12 "employer" within the meaning of FLSA Section 203(d), 29 U.S.C. 203(d)). (Defendants
13 have stipulated that Defendant Le is an employer within the meaning of the Act.)

14 Plaintiff's position: This is not properly an affirmative defense. Defendants have
15 denied the charging allegations in the Secretary's Complaint. Affirmative defenses
16 "admit allegations in the complaint but assert facts that would defeat recovery." Gaudi-
17 ello, 1990 WL 304271 at * 1.

18 The FLSA defines "employer" as "any person acting directly or indirectly in the
19 interest of an employer in relation to an employee," 29 U.S.C. § 203(d), while the verb,
20 "employ" is defined to mean "suffer or permit to work," 29 U.S.C. § 203(g). A person
21 who possesses or exercises authority over the employees or actively administers the
22 business of the corporate defendant is an employer within the meaning of the Act. Sa-
23 bine Irrigation, 695 F. 2d at 194-195.

24 Evidence to defeat Defendants' Affirmative Defense will consist of employer and
25 employee testimony as to Defendant Nguyen's role in Best Miracle, including payroll
26 and other business administration.

27 Eleventh Affirmative Defense: Defendants allege that persons who worked on
28 garments in their homes were not employees covered by the FLSA.

1 Plaintiff's position: Plaintiff is somewhat unclear as to Defendants' basis for this
2 defense as they appear to claim that persons who are employees when they work in the
3 Best Miracle shop are not also employees when they perform work for Best Miracle in
4 their own home.

5 Under Section 3(g) of the FLSA, "employ" includes "to suffer or permit to
6 work." It is well established that whether a person works at home has little bearing on
7 the issue of employee status under the FLSA where an employment relationship exists.
8 Goldberg v. Whitaker House Cooperative, 366 U.S. 28, 81 S. Ct. 933 (1961); Hodgson
9 v. Cactus Craft, 481 F.2d 464 (9th Cir. 1973).

10 Evidence to defeat Defendants' Affirmative Defense will consist of testimony by
11 third party employee witnesses as to the work they did for Best Miracle at home.

12 Thirteenth Affirmative Defense: Defendants allege that there is no equitable basis
13 for an injunction because Defendants are currently in compliance with the FLSA and
14 there is no evidence that future violations are likely to occur.

15 Plaintiff's Position: Under FLSA Section 17, the Secretary is authorized to seek
16 an injunction to enjoin future violations of the FLSA. 29 U.S.C. § 217. Where FLSA
17 violations have been established, particularly where falsification of records have been
18 established, the Court should issue an injunction, even if the employer is in present com-
19 pliance or claims to be so. Dunlop v. Davis, 524 F.2d 1278, 1280 (5th Cir. 1975).

20 The Plaintiff intends to defeat this Affirmative Defense with the evidence she will
21 present to establish violations of the FLSA, including: (i) the testimony of the Defen-
22 dants' employees as to their hours worked and failure of the time cards to accurately re-
23 flect all hours worked; (ii) the testimony of John Leung, the investigator for the testi-
24 mony of John Leung, the Wage and Hour Investigator, that Defendants failed to produce
25 the time records for all the hours worked by employees; (iii) testimony and documentary
26 evidence regarding surveillance of the Best Miracle shop conducted by WHI Leung; (iv)
27 testimony and documentary evidence that Defendants' payroll records falsely show that
28 employees as working between 30-40 hours per week when, in fact, they worked ap-

proximately 60 hours a week; (v) testimony and documentary evidence from Wage Hour investigators regarding a July 30, 2007 visit to the shop, when the WH investigators observed 31 employees at their work stations, 6 in the lunch room and 10 outside the shop, while Defendants' timecards were punched in to show only 15 as working on that day; (vi) discrepancies between Defendants' payroll records and time cards including instances where employees' time cards showed they had worked but they do not appear on the payroll; (vii) employee testimony regarding instances where they were paid in cash; and, (x) documentary evidence that the cash payments were not reflected on the payroll records.

D. Anticipated Evidentiary Issues

Plaintiff has filed the following motions in limine:

1. Motion in Limine No. 1 to preclude Defendants' expert witness, Bob Equals, C.P.A., from testifying at trial;
2. Motion in Limine No. 2 to preclude Defendants from inquiring about the Social Security numbers of non-party employee witnesses during trial;
3. Motion in Limine No. 3 to preclude Defendants from introducing at trial: (1) twenty-one (21) preprinted fill-in forms procured by Jesse Atilano; and, (2) five unsigned employee statements previously attached to Defendants' motion for summary adjudication;
4. Motion in Limine to preclude Defendants from inquiring as to the informer status of non-party employee witnesses at trial.

Defendants have filed the following motions in limine:

1. Motion in Limine No. 1 Regarding Plaintiff's Evidentiary Burden at Trial;
2. Motion in Limine No. 2 which seeks to preclude the Secretary from introducing any evidence at trial concerning Double T Corporation;
3. Motion in Limine No. 3 which seeks to preclude the Secretary from introducing Defendants' tax records or offering any evidence concerning Defendants' tax records at trial;

1 4. Motion in Limine No. 4 to Preclude Plaintiff from Introducing any Evidence
2 Concerning when Vehicles Arrived or Left the Premises.

3 **E. Anticipated Issues of Law**

4 The Plaintiff is not aware of any such issues.

5 **F. Bifurcation**

6 There is no need for a bifurcation of the issues in this case.

7 **G. Jury Trial**

8 This will be a bench trial. By the Order entered on January 14, 2010, the Court
9 granted the Secretary's Motion to Strike the Jury Demand.

10 **H. Attorney Fees**

11 While there is no specific provision in FLSA for attorneys fees, attorneys' fees
12 can be recovered if the Defendants prevail and otherwise come within the Equal Access
13 to Justice Act, 28 U.S.C. §2412. The Plaintiff contends that no attorneys' fees should be
14 recoverable in this case.

15 Dated: February 8, 2010

DEBORAH GREENFIELD
Acting Deputy Solicitor of Labor

LAWRENCE BREWSTER
Regional Solicitor

DANIEL J. CHASEK
Associate Regional Solicitor

21 _____/s/_____
22 BORIS ORLOV, Attorney
23 Attorneys for the Plaintiff
24 U.S. Department of Labor
25
26
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